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In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE STATE AND AMICI HAVE MISREPRESENTED SAWYER'S STANDARD.

Both Respondent and the United States consistently attempt to equate Sawyer's miscarriage of justice standard with the standards adopted by the Eighth and Ninth Circuits and with standards rejected by this Court in *Smith v. Murray*, 577 U.S. 527 (1986), and *Dugger v. Adams*, 489 U.S. 401 (1989). United States Brief ("U.S. Br.") 11, 15; Respondent's Brief ("Res. Br.") 9, 22. Respondent and amici argue that, like these other standards, Sawyer's proposed standard: (i) confuses actual innocence with actual prejudice; (ii) dismantles the requirement that a prisoner establish cause to avoid writ abuse; and (iii) will encourage writ abuse.

However, Sawyer's proposed standard clearly is distinct from – and far more rigorous than – the standards adopted by the Eighth and Ninth Circuits and the standards rejected by this Court in *Smith* and *Adams*. More important, whatever may be said about the other standards, Sawyer's standard does *not* confuse actual innocence with actual prejudice, does *not* dismantle the cause requirement, and will *not* encourage writ abuse.

Sawyer's proposed standard was clearly set forth in his brief:

> In sum, a fundamental miscarriage of justice will only arise in an exceptional case under the Court's precedents, since (1) generic errors in constitutional rules of procedure, no matter how inherently prejudicial, do not create miscarriages of justice; (2) constitutionally inadmissible but truthful evidence does not create a miscarriage of justice; (3) only errors which result in (a) the consideration of false evidence or (b) the preclusion of true mitigating evidence create miscarriages of justice; and (4) even then, a miscarriage of justice results only if there is a probability that the jury would not have imposed death.

Petitioner's Brief ("Pet. Br.") 19; *see also id.* 15. In light of Respondent and amici's misrepresentations regarding this

standard, it bears repeating that the standard focuses, not on the accuracy of the sentence, but on the accuracy of the *evidence* upon which the sentence was based. Further, the standard does not look simply at whether the prisoner suffered prejudice. *The standard also requires a showing that the death sentence was based on inaccurate or incomplete evidence.*[1]

A. Petitioner's Factual Inaccuracy Test Does Not Confuse Actual Innocence With Actual Prejudice.

Correctly observing that "[t]he concept of actual innocence is . . . quite distinct from that of actual prejudice," the United States argues: "The Eighth and Ninth Circuits have treated the 'actual innocence' doctrine as coextensive with 'actual prejudice.' Those courts have collapsed the two inquiries into one and eliminated the actual innocence doctrine." U.S. Br. 14. *See also, id.* at 15. Whatever the case may be with respect to the Eighth and Ninth Circuits' standards and the standards rejected by this Court in *Smith* and *Adams*, *Sawyer's standard* clearly is not coextensive with an actual prejudice test. Like the standards announced by this Court in *Kuhlmann v. Wilson*, 477 U.S. at 454, n.17, and *McCleskey v. Zant*, 111 S.Ct. 1454, 1474-1475 (1991), Petitioner's standard has a prejudice requirement. But also like the *Kuhlmann/McCleskey* test, Sawyer's test requires that the Petitioner . . .

[1] The only other standard endorsed by Petitioner was the one advanced by the dissent in *Johnson v. Singletary*, 938 F.2d 1166, 1200 (11th Cir. 1991) (Anderson, J., dissenting) (*en banc*). *See* Pet. Br. 15, n.21, 18, n.26, 47, n.64. Under this test, one may avoid a procedural bar where the error has resulted in a "factually inaccurate sentencing profile" but only where a reviewing court concludes that "the factual inaccuracies were so significant that it is *more likely than not* that the result would have been different." 938 F.2d at 1200. (emphasis in original; footnote omitted). The only significant difference between Petitioner's standard and the *Johnson* dissent's standard is that the latter has a higher prejudice threshold – "more likely than not" as opposed to the "fair probability" standard Petitioner draws from *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

"supplement[ ] his constitutional claim with a colorable showing of factual innocence." 477 U.S. at 454. *See also, Murray v. Carrier*, 477 U.S. 478, 496 (1986). Thus, Petitioner's test requires not only a showing that there is a probability that the outcome would have been different *but also a showing that the constitutional error resulted in the admission of false evidence or deprived the sentencer of considering true mitigating evidence crucial to the petitioner's culpability.* Pet. Br. 14. *It is this second requirement that distinguishes a claim of actual innocence from a claim of legal innocence*, as this Court held in *Kuhlmann, Smith*, and *McCleskey*. Furthermore, *it is this second requirement that distinguishes a claim of actual innocence from a mere claim of actual prejudice.*

B. Petitioner's Test Will Not Dismantle The Cause Requirement.

Respondent and the United States argue that the standards of the Eighth and Ninth Circuits (and, by extension, Sawyer's standard), because they are coextensive with an actual prejudice test, serve merely to destroy the requirement that a prisoner establish cause to avoid writ abuse. Res. Br. 24; U.S. Br. 16. This assertion, however, is again predicated upon both Respondent's and the federal government's mischaracterization of Sawyer's standard as being an actual prejudice test. As demonstrated *supra*, Sawyer does *not* propose a "pure prejudice" standard. Rather, Sawyer proposes a standard that requires a prisoner to show both prejudice *and* that the constitutional error resulted in the admission of false evidence or deprived the sentencer of considering true mitigating evidence crucial to the petitioner's culpability. Accordingly, like the standards of *Kuhlmann, Carrier* and *McCleskey*, Sawyer's standard does not serve merely to eliminate the requirement that the prisoner demonstrate cause.

C. Petitioner's Test Will Not Encourage Writ Abuse.

The federal government argues that Sawyer's standard will somehow encourage abuse of the writ. U.S. Br. 17. The

argument is flawed on numerous grounds. First, and most fundamentally, the argument fails to explain why a petitioner with a claim of actual innocence would not file the claim at the first available opportunity. The argument is counter-intuitive. By definition, a claim of actual innocence contains compelling factual allegations, and Petitioner's counsel has a strong incentive to file such a claim at the first available opportunity. To do otherwise would be to gamble with the prisoner's life.

Second, even assuming *arguendo* that the argument is not counter-intuitive, which it is, the implication that Sawyer's standard will result in an extensive number of successive filings is erroneous. As Sawyer demonstrated conclusively in his brief, his standard is limited to the rare and exceptional case by several restrictions, including the requirement that the evidence of innocence must be sufficiently powerful to provide a federal judge with an abiding conviction that the jury would have returned a different sentence if the jury had had all probative evidence before it. Pet. Br. at 17-19.[2]

Third, the argument cannot be reconciled with this Court's decisions in *Carrier* and *McCleskey*. Under *Carrier*, a petitioner who can make out a colorable showing of factual innocence need not, *in theory*, bring a procedurally defaulted claim in his first petition as opposed to, say, his second one. Similarly, under *McCleskey*, a petitioner who can make out a colorable showing of factual innocence need not, *in theory*, bring an abused claim in his second petition as opposed, say, to his third.

Fourth, this case demonstrates that the argument indisputably does not apply to successive claims. Sawyer's initial collateral counsel had every incentive to support the initial ineffective counsel claim with Sawyer's hospital records,

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[2] Moreover, the federal government's argument applies equally to actual-innocence claims that satisfy its eligibility standard. If a petitioner has an incentive to "sandbag" with a claim that satisfies Sawyer's standard, which he clearly does not, then the petitioner has the same incentive with a claim that satisfies any eligibility standard.

which so richly document his serious mental disorders, because the claim would have been far more likely to prevail.[3]

II. UNLIKE THE FIFTH CIRCUIT'S TEST AND THE MORE RADICAL TEST PROMOTED BY RESPONDENT AND THE UNITED STATES, PETITIONER'S STANDARD IS ROOTED IN THIS COURT'S PRECEDENTS.

As Sawyer demonstrated in this brief, his proposed standard is compelled by – and rooted in – precedents of this Court. The standard draws directly from this Court's standard of review for guilt-innocence miscarriage cases and from this Court's standard for assessing the impact of Sixth Amendment error in the capital sentencing context. *See* Pet. Br. 13-19 (citing, *inter alia*, *Kuhlmann; Carrier; McCleskey*; *Strickland v. Washington*, 466 U.S. 688 (1984)).

A. Petitioner's Test Is Compelled By *Kuhlmann* And *Smith*.

In *Kuhlmann*, this Court set forth its most extensive treatment of the miscarriage of justice doctrine and identified the doctrine's historical origins. Although Petitioner exhaustively discussed this treatment in his brief, Pet. Br. 16,

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[3] The three prisoners who have prevailed in the Fifth Circuit with claims of ineffective penalty phase representation presented mental health claims similar to Sawyer's claim here. *Loyd v. Smith*, 899 F.2d 1416 (5th Cir. 1990) (evidence of organic brain damage, frontal lobe dysfunction not presented; case remanded for hearing on prejudice); *Wilson v. Butler*, 813 F.2d 664 (5th Cir. 1987) (family witness's non-expert observations of prisoner's mental disorder not equivalent to "documented history of severe mental difficulties [I.Q. of 66] and testimony from an expert witness") (remanded for evidentiary hearing); *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986) (evidence of mental retardation not presented).

Respondent and its amici ignore it completely.[4] The essentials are as follows:

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Friendly, [Is Innocence Irrelevant? Collateral Attack On Criminal Judgments, 39 U.Chi.L.Rev. 142, 160 (1970)]. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts *would have entertained a reasonable doubt of his guilt.*

477 U.S. at 454, n.17.[5]

In *Smith v. Murray*, this Court applied the actual innocence concept to the capital sentencing context. This Court rejected petitioner's contention that his death sentence was a fundamental miscarriage of justice because:

> In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.

477 U.S. at 538. It is clear that Sawyer's standard is compelled by this Court's decisions in *Kuhlmann*, *Carrier*, *McCleskey*, and *Smith*. Under Sawyer's standard, a prisoner must show a fair probability that, in light of all the probative evidence, including any mitigating evidence not admitted at

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[4] Respondent and its amici cite *Carrier* as representing the origin of the actual innocence doctrine (Res. Br. 13; U.S. Br. 9), erroneously maintaining that "[t]his exception has never been given a more precise definition by this Court." Criminal Justice Legal Foundation Brief ("CJLF Br.") 7.

[5] Thus, under *Kuhlmann*, "[t]he prisoner may make the requisite showing by establishing that *under the probative evidence* he has a colorable claim of factual innocence." *Id.* at 454 (emphasis added).

trial and excluding any false aggravating evidence wrongly admitted at trial, the trier of fact would not have imposed death.

III. THE FIFTH CIRCUIT'S TEST AND THE MORE RADICAL TEST PROMOTED BY RESPONDENT REJECT THIS COURT'S JURISPRUDENCE REGARDING THE ACTUAL INNOCENCE DOCTRINE.

In place of Petitioner's standard, which is indisputably rooted in precedents of this Court, Respondent and amici propose some variant of an "eligibility" standard. Amicus CJLF support the Fifth Circuit's standard. Respondent, however, proposes a test that proves even more restrictive than the Fifth Circuit's standard by requiring "the petitioner [to] show that he is actually innocent of the underlying crime that makes him eligible for the death penalty." Res. Br. 27. Respondent's standard is supported by the United States. U.S. Br. 21.

Respondent and amici attempt to defend their radical tests by purportedly returning to "the roots of the innocence exception." CJLF Br. 9. However, the standards promoted by Respondent and its amici *reject* this Court's actual innocence case law, including *Kuhlmann*, *Carrier*, *McCleskey*, and *Smith*. To discover the roots of the various eligibility standards proposed by Respondent and amici, one must examine another tree altogether – *Jackson v. Virginia*, 443 U.S. 307 (1979).

A. Respondent And Amici Reject *Kuhlmann*, *Carrier*, And *McCleskey*, And Mistakenly Rely On *Jackson v. Virginia*.

Respondent and amici repeatedly cite this Court's decision in *Jackson* where they should cite this Court's decisions in *Kuhlmann*, *Carrier*, and *McCleskey*. To take only one, startling example, according to the federal government:

> A person is actually innocent if no reasonable jury could find beyond a reasonable doubt that he committed all of the elements of a charged offense. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

U.S. Br. 14. *See also id.* at 20, 21; Res. Br. 10, 26, 27, 47.

This is an unabashed misstatement of the law, and demonstrates conclusively that Respondent and amici fail to comprehend this Court's miscarriage doctrine. *Kuhlmann* plainly states that the miscarriage doctrine applies when a prisoner can show there is a *"fair probability* that . . . the trier of the facts would have entertained a reasonable doubt of his guilt." 477 U.S. at 454-455, n.17 (emphasis added).[6]

The reason that Respondent and amici seek to replace this Court's decisions in *Kuhlmann, Carrier, McCleskey* and *Smith* with this Court's decision in *Jackson* is clear. Respondent and amici devote large sections of their briefs attempting to challenge Sawyer's proposed standard with the following argument: a petitioner cannot bring a *Jackson* challenge to his death sentence under federal constitutional law because there is no correct outcome in a sentencing phase; therefore, a petitioner may not challenge his death sentence as a fundamental miscarriage of justice. Res. Br. at 13; 15; 17; 22; 26. U.S. Br. 14, 20-21; CJLF Br. 27.

This argument is plainly erroneous. Like a defendant challenging his conviction under *Kuhlmann*, Sawyer does not challenge his jury's determination in light of the evidence presented to it, as would be the case under *Jackson*. Rather, Sawyer asserts that his jury's determination was shewed by

[6] Both amicus and Respondent erroneously replace *Kuhlmann* with *Jackson* without even acknowledging Petitioner's extensive demonstration that the Fifth Circuit's reliance on *Jackson* was completely misplaced. Pet. Br. 23-27; Res. Br. 48. As Petitioner pointed out in his brief, the *Jackson* sufficiency test is itself an eligibility test, asking whether the defendant was eligible for a conviction. Pet. Br. 23-27. *Jackson* is as irrelevant to an actual innocence analysis as it is essential to the standard promoted by Respondent in this Court. *See* Pet. Br. 23-27.

false aggravating evidence and by the jury's failure to hear true mitigating evidence. Sawyer asks a federal judge not to decide whether his jury's determination was correct, but whether there is a probability that the determination would have been different if the jury had not been exposed to the false aggravating evidence and if the jury had been presented with the true mitigating evidence. In other words, the "correctness" of the jury's determination is not questioned by Sawyer, just as it is not questioned by a defendant who asserts a *Kuhlmann* claim with respect to his conviction. In short, even assuming *arguendo* that a capital murder sentencing decision cannot be correct or incorrect,[7] that does not mean that: (1) such a decision cannot be skewed by false evidence or by the failure to admit true evidence; or (2) it is for some unexplained reason inappropriate to inquire whether there is a fair probability the outcome would have been different, absent the skewing.

B. Respondent And Amici Reject This Court's Decision In *Smith v. Murray*.

In their briefs, Respondent and the federal government contend that the innocence exception should not apply to an alleged error at a capital sentencing proceeding. *See, e.g.*, U.S. Br. 24 ("[t]he nature of the sentencing judgment in capital cases . . . suggests that a defendant's actual innocence is best determined by reference to his guilt of the underlying

[7] Respondent claims that "this Court noted that there is no objective measure by which the sentencer's decision can be deemed correct or erroneous so long as it is made within the authority conferred by the legislature." Res. Br. 17 (citing *Bullington v. Missouri*, 451 U.S. 430, 444 (1981)). However, this phrase is found not on the cited page, or even in the majority opinion, but in the dissent. 451 U.S. at 450. In any event, there *is* a correct outcome under Louisiana law. *State v. Sonnier*, 380 So. 2d (La. 1979) (death sentence vacated because "jury disregard[ed] numerous and persuasive mitigating circumstances that clearly outweigh the aggravating circumstances").

crime");[8] Res. Br. 13.[9] The short and dispositive answer to this contention is that both *Smith* and *Adams* extended the availability of the actual innocence exception to capital sentencing claims.[10] The only issue in this litigation is *how* – not *whether* – the standard will be translated into the capital sentencing context.

Amicus CJLF seeks to distinguish *Smith* by arguing weakly that *Smith* "does not contradict the eligibility test." CJLF Br. 20. Amicus then wildly speculates about how the Court *might* have ruled *if* it had reached the merits of Smith's claim of constitutional error. Further, amicus is compelled to erroneously label as "dicta" (CJLF Br. 24) *Smith*'s express

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[8] The federal government also argues that Sawyer's standard, which is taken directly from *Smith*, "would be the appropriate standard if the question were whether a prisoner had shown actual prejudice in his first habeas petition, but it is insufficiently deferential to the State's interest in finality in circumstances like these." U.S. Br. 26. Again, this issue is settled. This Court, in *Smith* and, indeed, in *Kuhlmann* held that the State's important interest in the finality of its judgments must yield when a petitioner can make out a colorable showing of factual innocence.

[9] At one point in its brief, Respondent claims that this Court's decisions in *Smith* and *Adams* contain "[i]mplications" of its eligibility standard. Res. Br. 19-20. Respondent fails to indicate how either of these cases provide any support for the eligibility theory, and they clearly do not. Indeed, Respondent is compelled to conclude its laconic discussion of *Smith* by acknowledging that "[i]n rejecting petitioner's claim, this Court determined that the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." Res. Br. 20 (citing *Smith*, 477 U.S. at 538). Elsewhere, Respondent argues at length that Sawyer's jury did not receive distorted or inaccurate information. *See* Res. Br. 36-46. For the most part, however, Respondent recognizes that to prevail it must reject *Smith*'s concern with inaccurate evidence. *See* Res. Br. 31 ("[t]he jury had information regarding Sawyer's . . . personality disorder, *whether accurate or not*. . . . ") (emphasis added).

[10] A longer answer, also dispositive, is that the eligibility concept cannot be reconciled with the Eighth Amendment's core concern with individualized sentencing. *See infra*.

holding that petitioner's claim was rejected because "[i]n short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." 477 U.S. at 538.[11]

IV. ELIGIBILITY IS A FLAWED CONCEPTION OF DEATH INNOCENCE.

Because they propose eligibility standards, Respondent and amici must assert that any member of a death-eligible class deserves to die and that no injustice occurs by executing anyone within the class. However, as Petitioner pointed out in his brief, the concept of eligibility collides with the Eighth Amendment's core concern for individualized consideration. Pet. Br. 31-34. As this Court recently stated, "Our decisions subsequent to *Jurek [v. Texas*, 428 U.S. 268 (1976)] have reaffirmed that *the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty.*" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (emphasis added)).[12]

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[11] Originally, Smith's attorney sought the psychiatric evaluation to explore psychiatric mitigating evidence. *See* Question I, Petition for Writ of Certiorari (available on LEXIS), *Smith v. Murray*, 477 U.S. 527 (1986), *cert. granted sub nom. Smith v. Sieleff*, 474 U.S. 918 (1985). The statement of facts contained in Smith's brief states that counsel sought psychiatric evaluation "in order to explore the availability of psychiatric defenses to the charges and especially of claims in mitigation based on psychopathology." Brief for Petitioner, *Smith v. Murray*, 477 U.S. 527 (1986) (available on LEXIS).

[12] In *Penry*, this Court also stated that, "full consideration of evidence that mitigates against the death penalty is *essential* if the jury is to give a reasoned moral response to the defendant's background, character and crime" (492 U.S. at 328 (quotations omitted; emphasis omitted and added)), and that "[e]vidence concerning . . . the defendant's . . . emotional history . . . bears directly on the *fundamental justice of imposing capital punishment.*" *Id.* at 338 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (concurring opinion) (emphasis

(Continued on following page)

Indeed, this Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), recognized that:

> *[A]ccurate sentencing information* is an *indispensable prerequisite* to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

428 U.S. at 190 (emphasis added).

If *accurate* sentencing information is an *indispensable prerequisite* to a reasoned determination of whether a defendant shall live or die, then any rational conception of death-innocence must allow for claims of error which *seriously* implicate the integrity of the sentencing profile. Because eligibility *refuses to even consider claims of error pertaining to mitigating evidence*, it must fail as a touchstone of death-innocence under the Eighth Amendment.

Respondent and amici make no principled attempt to defend the merits of eligibility as a concept for determining death-innocence, or to reconcile the concept with this Court's Eighth Amendment jurisprudence. Instead, they merely insist that any attempt to apply the miscarriage of justice concept to a capital sentencing proceeding will not work. The argument apparently proceeds as follows: (1) guilt-innocence determinations, including determinations as to a defendant's eligibility for the death penalty, are governed by objective criteria that preclude jury discretion; (2) capital sentencing determinations are subjective and discretionary; (3) the standard set forth by this Court in *Kuhlmann* depends on the objective criteria that govern guilt-innocence determinations; and (4) the *Kuhlmann* standard, as adopted for innocence of death

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added)). Accordingly, it certainly would be a *fundamental miscarriage of justice* to deny a petitioner the right to a hearing on a successive claim that demonstrates that he was sentenced to death because the jury considered a grossly distorted picture of his emotional history.

claims, can only be applied to determinations as to a defendant's eligibility for the death penalty. *See* Res. Br. 13-16, 21-22, 26.

This argument is fatally flawed. Even assuming *arguendo* that guilt-innocence determinations are somehow "more objective" than sentencing determinations, this proves nothing. As Respondent concedes, the "process of selecting those eligible defendants for whom death is appropriate is the trier of fact's '[reasoned][13] moral response' to the evidence presented by the state and the defendant." Res. Br. 15. If the determination of whether or not a defendant deserves a death sentence is necessarily a "reasoned moral response" to aggravating and mitigating evidence, then a defendant is innocent of the death penalty if the sentencer's reasoned moral response is to vote for a life sentence.[14] Therefore, it certainly "makes sense," to use Respondent's phrase, to conclude that a petitioner may be innocent of his death sentence if he demonstrates: (i) his jury, in conducting its reasoned moral inquiry, considered false aggravating evidence or did not consider true mitigating evidence; and (ii) there is a probability that the jury's sentence would have been different if the jury, in conducting its reasoned moral inquiry, had not considered the false facts or had considered the true facts.

Nowhere does Respondent explain why the "actual innocence of death" standard should not embrace a factually-skewed reasoned moral inquiry into the appropriate sentence merely because the moral inquiry is supposedly more "subjective" than an inquiry into a defendant's guilt or innocence.[15]

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[13] The moral inquiry is a "*reasoned* moral inquiry." *Penry*, 492 U.S. at 328 (emphasis added).

[14] Conversely, one is guilty of the death penalty if the *reasoned* moral inquiry produces a death sentence. *See, Poland v. Arizona*, 476 U.S. 147, 156 (1986) (noting that one is guilty of the death penalty when "a defendant is sentenced to death, i.e., 'convicted.' ").

[15] Respondent mistakenly cites *McCleskey* as support for its position. Res. Br. 19. *McCleskey* turned solely on the truthfulness of the evidence, not on "objective criteria." 111 S.Ct. at 2474-1475.

The purported "subjectivity" of a sentencing determination might be a relevant factor if, under Sawyer's standard, a petitioner were challenging the result of his jury's moral inquiry as "incorrect," but Sawyer's standard encompasses no such challenge. *See supra.*

In any event, Respondent, at best, overstates the alleged distinction between the objective criteria that purportedly govern a guilt-innocence determination and the subjectivity that purportedly infuses a sentencing determination. This Court has consistently recognized that a jury's decision as to the guilt or innocence of a criminal defendant necessarily involves a large degree of discretion and subjectivity. *Jackson* itself demonstrates this point. Convictions are not reversed under *Jackson* merely because a reasonable juror could have found the defendant innocent. Thus, *Jackson* recognizes that some reasonable jurors might vote to convict when others would vote to acquit, and recognizes, as well, that the differing outcomes are a result of the subjectivity and discretion that play – and must play – such a large role in jury guilt-innocence determinations.[16]

Further, Respondent errs in contending that the decision as to whether "the defendant deserves a particular punishment" is "merely . . . subjective." Res. Br. 16. The Louisiana capital punishment statute contains objective factors governing aggravating circumstances and mitigating circumstances.[17] In addition, as Petitioner has pointed out, a capital

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[16] *Jackson* developed a highly deferential standard of review to give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 443 U.S. at 319. Indeed, elsewhere in its brief, the State acknowledges this fact. *See* Res. Br. 26 ("core concern of *Jackson v. Virginia* . . . was developed to insulate *the discretionary function of the jury from judicial scrutiny*") (emphasis added).

[17] Two mitigating circumstances relate to mental disorders. *See* La. Code Crim. Proc. Ann. Art. 905.5 (West 1984).

jury is required to consider evidence proffered in mitigation (*see supra*), and this Court has indicated that a jury may not consider false or misleading aggravating evidence. *Zant v. Stephens*, 462 U.S. 862, 887, n.23 (1983).[18]

V. SAWYER'S HISTORY OF SEVERE MENTAL DISORDERS MAKES HIS THE EXTRAORDINARY CASE.

In his brief, petitioner demonstrated that his richly documented history of crippling mental disorders makes his the extraordinary case that compels application of the fundamental miscarriage of justice doctrine. Pet. Br. 38-39. In response, Respondent erroneously implies that Sawyer's 1990 psychiatric reports are the product of "new, 'friendly' expert[s]." Res. Br. 23. Respondent also incorrectly contends that the 1990 reports "lack credibility because their conclusions are speculative and unsupported by objective evidence in the record." Res. Br. 34. *See also id.* at 38, 41.

Respondent's assertions are difficult to fathom. Sawyer's history of mental disorders is abundantly documented in several sets of records pre-dating Sawyer's trial. The 1990 psychiatric reports merely confirm this history. Thus, for example, records of Sawyer's teenage institutionalizations (JA 537-540) directly support the current diagnoses of mental

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[18] Equally unavailing is Respondent's and amicus CJLF's contention that Sawyer's standard requires federal courts to "reweigh[ ] the evidence from the penalty phase." Res. Br. at 22; 15; 17; 21; 22; 24. *See also* CJLF Br. at 24. Under Sawyer's standard, federal courts merely are required to determine whether the petitioner's sentencer was presented with false aggravating facts or was not presented with true mitigating facts and, if so, whether there is a probability that the sentencer's decision would have been different in light of all the probative evidence. As Petitioner pointed out in his brief, federal courts routinely evaluate the impact of penalty phase error. Pet. Br. at 30-31 (citing, *inter alia*, *Strickland v. Washington*, *supra*).

retardation and frontal lobe dysfunction. JA 541-568. Moreover, laboratory tests support the early and more recent diagnoses of organic impairment. Sawyer had an abnormal electroencephalogram in 1965.[19] JA 538, More sophisticated laboratory testing (magnetic resonance imaging, or MRI) in 1990 yielded further evidence of organic impairment: "The MRI provides supporting evidence that he has brain damage." JA 546-547. Further, the 1990 evaluations also are supported by hospital records, clinical interviews, school records, a complete social history, a documented history of head trauma, intelligence testing, neurological testing, and both objective and projective psychological test data. JA 542-543, 559-562.

The speculative psychiatric findings in this case were presented to the jury by incompetent trial counsel. Respondent urges this Court to accept the state psychiatrists' findings,[20] contending that the diagnosis of sociopathy "may be an accurate diagnosis of Mr. Sawyer at that time in his life." Res. Br. 35-36 (citing *Diagnostic and Statistical Manual of*

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[19] Respondent maintains that "[a]n abnormal EEG is not unusual. . . . " Res. Br. 39. Not surprisingly, Respondent provides no authority for this proposition. The reason that Sawyer's more recent EEG was within normal limits is that the instrument is better at detecting abnormality in youths than adults. "An EEG is indicated in schizophrenic patients who are younger [or] are presenting with their first psychotic episode. . . . " Kaplan and Saddock, *Comprehensive Textbook of Psychiatry*, 530 (5th ed. 1989). In any event, more advanced laboratory testing in 1990 not only identified Sawyer's organic impairment, but located the affected area. JA 546-547.

[20] Drs. DeVillier and Arneson based their diagnoses on a brief interview with Mr. Sawyer. J.A. 341-346. The Louisiana Supreme Court has criticized Dr. DeVillier's psychiatric findings in a virtually identical situation. *State v. Hamilton*, 373 So.2d 179, 183 (1979) (reversing finding of competency to proceed since, *inter alia*, trial court relied on Devillier's conclusions which were "unsupported by reasons and factual information, and is supported only by a twenty minute interview and the doctor's experience").

Mental Disorders[21] ("DSM")). The DSM, however, provides no support for Respondent's position because the state psychiatrists neglected to rule out organic dysfunction before reaching their diagnostic impressions.[22]

Respondent challenges lifelong documentation of mental retardation by suggesting that Mr. Sawyer is a riverboat pilot. Respondent engages in an unauthorized romp outside the record by referring to "testimony" by Mr. Sawyer at the two clemency proceedings conducted before the Louisiana pardon board.[23] Res. Br. 30-31, 40, 43. These extra-record excursions violate one of the most time-honored rules of appellate practice – that counsel may not refer to matters outside the record on appeal. *Russell v. Southard*, 53 U.S. (12 Howard) 139, 159 (1852).

Part of this "testimony" is accurately reported, part is not. Respondent accurately reports that Sawyer told the pardon board that he had passed the coast guard licensing test, which is admittedly quite difficult.[24] Respondent, however, neglects to cite to *the only evidence in the record on this point* – a letter from U.S. Coast Guard Commander R. G. Ross establishing that Sawyer did not hold a riverboat pilot's license. R. 1264.

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[21] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Revised 3rd ed. 1987).

[22] *See* DSM, xxiv-xxv ("[w]hen an Organic Mental Disorder can account for the symptoms, it preempts the diagnosis of any other disorder that could produce the same symptoms"). The psychologist who evaluated Sawyer in 1990 recognized this fact. *See* JA 568.

[23] Witnesses are not under oath at the pardon board proceedings. Moreover, no record, formal or informal, exists of these proceedings. They are neither stenographically reported nor recorded in any other fashion.

[24] Respondent inaccurately reports the "testimony" of Dr. Alec Whyte concerning his response to Sawyer's statements. It is tempting, of course, to set the record straight on this matter. But since there is no record to cite to, this would simply pit Petitioner's word against Respondent's.

Respondent suggests that Mr. Sawyer's testimony rebuts the abundant documentation of mental retardation in this case. In fact, it illuminates the gravity of Sawyer's mental disabilities. While Sawyer's counsel attempted to convince the pardon board that he was too impaired to be executed,[25] Sawyer pathetically attempted to portray himself as a skilled riverboat navigator. This misguided, self-defeating behavior, known as "cheating to lose," is common among the mentally retarded.[26]

Finally, Respondent attempts to minimize the significant mitigating value of evidence of mental retardation by noting that "Sawyer does not offer any evidence of the general behavior of jurors with respect to sentencing mentally retarded defendants. . . . " Res. Br. 39. In fact, the only such study establishes that capital jurors in two Southern states, including Louisiana, consider mental retardation *more mitigating than any other category of evidence*. Sandys (1991, November) *The Life and Death Decisions of Capital Jurors: Preliminary Findings From Kentucky*,[27] (paper presented at the annual meeting of the American Society of Criminology, San Francisco, CA).[28] On the other hand, none of the jurors

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[25] Ultimately, the pardon board recommended clemency, but the governor rejected the recommendation.

[26] *See* Ellis and Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 430 (1985) ("Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma. *In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom*" (footnote omitted; emphasis added)).

[27] The data set includes 30 jurors from Kentucky and 13 from Louisiana.

[28] Post-trial interviews with capital jurors revealed that 79% of the respondents viewed a defendant's mental retardation as mitigating. "The factor most clearly interpreted as mitigation is that the defendant was mentally retarded (by 79%)." *Id.* at 7. The same results obtained for the Louisiana subset. "In fact, mental retardation again was the factor most

(Continued on following page)

surveyed viewed either mental retardation or mental illness as an aggravating factor, which rebuts the government's unsupported allegation that evidence of mental illness may aggravate the offense. U.S. Br. 18, n.9. *See also Zant v. Stephens*, 462 U.S. 862, 885 (1983) (state may not treat mental illness as aggravation); *Penry*.

Moreover, since *Penry*, in addition to Georgia and the federal government, 492 U.S. at 356, four states have enacted legislative bans against executing retarded citizens. *See* Ky. Rev. Stat. Ann. Sec. 532.140 (Michie/Bobbs-Merill 1990); Md. Code Ann. art. 27, Sec. 412 (f) (1) (1990); N.M. Stat. Ann. Sec. 31-20A-2.1 (Michie 1991); Tenn. Code Ann. Sec. 39-13-2-3 (1990).

CONCLUSION

For the reasons advanced herein and in the Brief for Petitioner, this Court should reverse the Court of Appeals' decision and remand this case for a hearing on the merits of Mr. Sawyer's claims of constitutional violations. Alternatively, should this Court uphold the Court of Appeals' proposed test, this case should be remanded to the federal district court for a hearing on the merits of the claim that the state withheld exculpatory evidence, and to the Supreme Court of Louisiana to determine whether Mr. Sawyer is

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clearly interpreted as mitigation by the Louisiana jurors. Therefore, as in KY, mental retardation was a stronger mitigator than any of the other 17 (mitigating) factors questioned." *Id.* The next most clearly defined category was that the defendant had a history of mental illness (69%). *Id.*

"eligible" for the death penalty under state law, specifically, Louisiana Supreme Court Rule 28.

Respectfully submitted,

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